

A **YONG TOI MEE & ANOR v. MALPAC HOLDINGS BHD & ORS**

HIGH COURT MALAYA, KUALA LUMPUR

MOHD NAZLAN GHAZALI J

[SUIT NO: WA-22NCC-326-09-2016]

24 AUGUST 2017

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CIVIL PROCEDURE: *Res judicata – Final judgment obtained – Apex court affirmed findings of trial judge – Revisiting issues after perfection of order – Refusal to comply with decisions of courts by continually instituting different proceedings – Whether party could re-litigate or raise issues conclusively decided – Whether decision of apex court rendered matter final – Whether repeated litigation constituted abuse of process*

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The plaintiffs entered into an agreement to purchase the plantation assets of the second defendant as part of the overall restructuring of the first defendant under the auspices of Pengurusan Danaharta Malaysia Berhad. The third to the ninth defendants were all directors on the Board of the first defendant at the material time, with the eighth defendant being the Chairman. The tenth defendant was the Chief Executive Officer of both the first and second defendants. The crux of the case of the plaintiffs herein, and the basis for their action under the torts of abuse of process brought against the first and second defendants and conspiracy against all the ten defendants was for the refusal to comply with the decisions of the courts by continually, in their institution of subsequent and different proceedings, seeking, among others, to set aside the decree of specific performance on the purchase of the plantation assets against them granted on 5 May 2011 by the High Court in Ipoh High Court Suit ('HC Judgment Suit 109'). The HC Judgment Suit 109 which was in favour of the plaintiffs which then obtained the order for the specific performance for the completion of the purchase of the plantation assets was subsequently reversed by the Court of Appeal. The Federal Court on 4 September 2013 however restored the HC Judgment Suit 109, and directed the plaintiffs to make payment of the balance purchase price within one month ('the FC Judgment Suit 109'). Despite the plaintiffs' conduct towards compliance with the FC Judgment Suit 109, the second defendant refused to complete, and instead filed for a review application on 3 October 2013 to the Federal Court against the FC Judgment Suit 109. The review application was dismissed by the Federal Court on 4 March 2014 ('the FC review'). Efforts by the plaintiffs to complete the purchase after the FC review continued to be unsuccessful as the first and second defendants sought legal opinions, despite the FC Judgment Suit 109 and the FC review. The Board of the first defendant on 23 April 2014 resolved to convene an extraordinary general meeting ('EGM'), to seek its shareholders' approval for, among others, the disposal of the additional shares of 99,998 in the enlarged capital of Radiant Response Sdn Bhd ('RRSB'), and the mill at the plantation lands to the plaintiffs, whilst the Board agreed to regulate an interim position with

the plaintiffs on the basis of their ownership of only the two shares in RRSB. The plaintiffs thus felt compelled to seek enforcement of the specific performance which, as had been decided by HC Judgment Suit 109, FC Judgment Suit 109 and the FC review, concerned the entire share capital of RRSB, not just the two shares. The plaintiffs filed a notice of application at the Ipoh High Court for orders to give effect to the specific performance ('encl. 62'). At the EGM held on 31 July 2014, the said proposed disposals to the plaintiffs failed to secure the approval of the shareholders of the first defendant. On 22 September 2014, the second defendant filed a cross-application at the Ipoh High Court ('encl. 69') requesting the Ipoh High Court to determine certain threshold questions and issues of law, but clearly to seek the discharge of the specific performance on the strength of the alleged absence of shareholders' approval under s. 132C for the disposal of the additional shares in RRSB and the mill to the plaintiffs. It also sought to set aside the same on the basis that the sum of RM36.7 million was due from the plaintiffs in respect of the management of the plantation lands and the mill. On 17 February 2015, the Ipoh High Court allowed encl. 62 for the plaintiffs and dismissed encl. 69 against the second defendant, who appealed against both these decisions. On 15 August 2015, the second defendant's appeal was dismissed by the Court of Appeal. Following the dismissal of the appeal by the Court of Appeal in respect of encls. 62 and 69, the second defendant sought leave to appeal to the Federal Court. This was refused. Then, the first defendant, the second defendant's parent, filed on 15 April 2016 a suit ('Suit 145') in this court as the plaintiff and the second defendant claimed to be a nominal party as the first defendant. Suit 145 sought guidance from this court on the legal implications of the absence of the s. 132C approval given the rejection of the proposal on the transfer of the 99,998 shares, to complete the purchase and give effect to what was first granted by the HC Judgment 109. This court on 11 April 2017 dismissed the claim of the first defendant in Suit 145 by reason principally of *res judicata*. Subsequent to the filing of the Suit 145, the plaintiffs commenced this instant proceeding ('Suit 326'), responded to by the second defendant by the filing of the counterclaim seeking for various declarations and reliefs, including an account for profit share and rental for the plantation lands and the related mill from July 2011 for the sum of RM43,045,551.38, unjust enrichment on the part of the plaintiffs in respect of the increased share capital in RRSB, the need for approval under s. 132C of the Companies Act 1965 for the transfer of 99,998 shares, that the same shares be restored to the second defendant, and that the High Court decision on encls. 62 and 69 dated 17 February 2015 granted to the plaintiffs be impeached on the ground of fraud.

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A Held (allowing plaintiffs' claim with costs; dismissing defendants' counterclaim):

- B** (1) The essence of the law on the tort of abuse of process as it applied is the fundamental test of whether the legal process was utilised for some improper or ulterior purpose other than to seek a genuine redress in respect of which the process offers. There is no additional legal element or substantive requirement of the tort of abuse of process which required any overt act or threat to be shown which was separate from the legal process or the improper purpose. But this was not to say that such overt acts or threats, if they exist, were irrelevant. After all, the cornerstone of legal proceedings in all justice system is the adequacy of evidence. **C** The overt acts and threats instead constitute evidence towards proving the presence of the improper or collateral purpose. Their importance are evidentiary in nature *vis-à-vis* the element of improper purpose. (paras 47 & 48)
- D** (2) Despite the finality of the decision of the apex court, the first and second defendants chose to commence various other proceedings, one after the other, which predominant relief unmistakably included the setting aside of the decree of specific performance. It started with the FC review, then the cross-application in encl. 69 and later Suit 145. All sought to achieve the same objective. They constitute, individually and collectively a clear collateral attack on the judgments of the High Court and the Federal Court in Suit 109. Suit 145 had the additional design of attacking the High Court and the Court of Appeal judgments on encls. 62 and 69. (paras 53 & 54)
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- F** (3) In respect of the FC review, and especially encl. 69 as well as Suit 145, may be construed as the overt acts and threats that evidence the abuse. All legal process was thus utilised with the improper purpose of denying the plaintiffs the fruits of their litigation, thus causing injury to their interests. They had lost the opportunity to maximise yield and income from the plantations and the mill during the period that they should have been the true and lawful owner of the same, and had expended unnecessarily on inefficient infrastructure and machineries at the mill when they could have invested more cost efficiently early on instead. **G** The design of these litigation was manifestly to achieve a purpose other than a genuine redress that the process actually offers. The dominant and collateral purpose for which these proceedings were initiated was to achieve a result not intended by the invocation of the process, which in this case had been to delay and altogether deny the fruits of the litigation to the plaintiffs, by using the court process which in the first place was intended to achieve justice, to instead attain the complete opposite, and more so at the same time in the process, openly refusing to obey the decisions of the courts. (paras 58, 63 & 66)
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- (4) The conduct of the defendants was plainly an abuse since it was engendering non-acceptance of judgments of the courts that could not be countenanced in any circumstances. Judgments of the courts must be obeyed not merely for the sake of ensuring respect for the courts. It is essential for the higher and larger purpose that it underpins the administration of the system of justice. Acts or conduct which serve to undermine the integrity of the system erode confidence in the judicial institution that would in the process harm the nation's constitutional democracy, its governance by the rule of law and deny the fundamental tenets on the supremacy of the Constitution. As such, in the instant case, since it had been shown that the various proceedings had been initiated by the first and second defendants for an improper purpose, resulting in injuries to the plaintiffs, the tort of abuse of process had clearly been established. (paras 74 & 86)
- (5) The defendants could not pass muster the requirements of s. 132(1B) that the decisions were made in good faith, for proper purpose, in the reasonable belief that they were appropriate and in the best interest of the company, and without any personal interest in the decisions, to benefit from the protection of the said s. 132(1B). Neither does the law not recognise the ability of the first and second defendants of conspiring with one another on account only of the identity of interest between the two. They were separate legal entities but they were also related corporations under Companies Act 1965. (paras 99 & 100)
- (6) The irresistible inference that must be drawn from the aforesaid conduct and acts of the defendants in Suit 326, was that the conspiracy of combination or agreement involving all the ten defendants in their respective parts and roles consisted principally of their common agreement of objectives of persistently denying the plaintiffs, despite the FC Judgment Suit 109, from enjoying the fruits of their litigation, continually refusing to execute specific performance, demanding for more payments from the plaintiffs, and ensuring that the first and second defendants retained the plantation assets as the core business of the group. (para 103)
- (7) There was no insurmountable difficulty in showing that the defendants in a conspiracy had acted with a predominant intention to injure the plaintiffs, because even though the defendants may have done so to enrich themselves, the element of the intention to injure could nevertheless still be found against them, since a loss to the plaintiffs was the flipside or opposite to the gain for the defendants. Such an intention was also sufficient for purposes of establishing the tort of unlawful means conspiracy for it was directed at the plaintiff and it could

- A reasonably be foreseen that it may injure them and did in fact injure them. The unlawful means employed by the defendants was the continual re-litigation of the issues which were manifestly already *res judicata*, which was also a substantive rule of law, as well as engaging in an abuse of process in their incessant pursuit of the various proceedings. (paras 107 & 109)
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- (8) The defendants could not be said to have held on to the belief that they had a lawful right to continually litigate matters which had been adjudicated on, especially when the courts had specifically pointed out in express terms that encl. 69 was wholly unnecessary and had been initiated due to the second defendant's disobedience and defiance in its refusal to accept the judgment of the court. Given there was no dearth of clear, positive and convincing evidence on the satisfaction of the elements of the defendants having in combination and agreement colluded to injure the interests of the plaintiffs and taken steps for that purpose in concerted fashion, resulting in loss to the plaintiffs, the torts of lawful means as well as unlawful means conspiracy had thus been established by the plaintiffs against all the defendants. (paras 120 & 121)
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- (9) The counterclaim could achieve nothing but failure because the allegations and complaints as well as the reliefs pleaded in the same are, yet again, *res judicata*. The counterclaim was thus far the final instalment in the unmeritorious series of re-litigation mounted by the defendants. It was an abuse of process by the second defendant pure and simple. (para 141)
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- Case(s) referred to:**
- F *Bank Simpanan Nasional v. Rudysham Abdul Raof* [2017] 4 CLJ 234 HC (*refd*)
Belmont Finance v. Williams Furniture [1980] 1 All ER 393 (*refd*)
Crawford Adjuster and others v. Sagicon General Insurance (Cayman) Ltd and another [2013] 83 WIR 257 (*refd*)
Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA (*refd*)
- G *Deepak Jaikishan Jaikishan Rewachand v. Intrared Sdn Bhd & Another* [2013] 7 MLJ 437 (*refd*)
First Subsea Ltd v. Balltec Ltd and Others [2014] EWHC 866 (*refd*)
Formis Resources Bhd & Ors v. Risk Management and Safety Systems Pty Ltd & Ors And Other Appeals [2016] 9 CLJ 169 CA (*refd*)
- H *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478 (*refd*)
Hunt v. Severs [1994] 2 AC 350 (*refd*)
Jones and another v. Stroud District Council [1988] 1 All ER 5 (*refd*)
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA (*refd*)
Linden Gardens Trust Ltd v. Lenesta Sludge Disposal Ltd [1993] 36 Con LR 1 (*refd*)
- I *Lonrho plc v. Fayed* [1992] 1 AC 448 (*refd*)

- Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337 CA (*refd*) A
- Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 CA (*refd*)
- Malpac Capital Sdn Bhd v. Yong Toi Mee & Ors and Another Appeal* [2016] 8 CLJ 613 CA (*refd*)
- Maxwell-Smith v. S & E Hall Pty Ltd* [2014] 308 ALR 149 (*refd*)
- Meretz Investments NV v. ACP Ltd* [2008] Ch 244 (*refd*) B
- Mulcahy v. R* (1868) LR HL 306 (*refd*)
- Nagase Singapore Pte Ltd v. Ching Kai Huat* [2008] 1 SLR(R) 80 (*refd*)
- OBG Ltd and others v. Allan* [2007] UKHL 21 (*refd*)
- Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 29 (*refd*)
- R v. Siracusa* [1989] 90 Cr App Rep 340 (*refd*)
- Rookes v. Barnard and Others* [1964] 1 All ER 367 (*refd*) C
- SL v. HM Revenue and Customs* [2008] 2 All ER 413 (*refd*)
- The King and the Attorney-General of the Commonwealth v. Associated Northern Collieries & Ors* [1911] 14 CLR 387 (*refd*)
- Twentieth Century Fox Films Corporation and Others v. David Harris and Others* [2014] EWHC 1568 (*refd*) D
- Varawa v. Horward Smith Co Ltd* [1911] 13 CLR 35 (*refd*)
- Williams v. Spautz* [1992] 107 ALR 635 (*refd*)
- Yong Toi Mee & Anor v. Malpac Capital Sdn Bhd & Anor* [2013] 8 CLJ 725 FC (*refd*)
- Legislation referred to:**
- Companies Act 1965, ss. 132(1B), 132C
- For the plaintiffs - P Gananathan, Olivia Loh, Ng Choo Beng & Yeoh Kai Ying; M/s Ng Choo Beng R Naidu & Partners*
- For the 1st defendant - WT Low; M/s Weng & Co*
- For the 2nd defendant - SH Leong; M/s Leong & Partners*
- For the 3rd-10th defendants - Tharminder Singh & Aravind Kumar; M/s Izral Partnership*
- For the 3rd defendant in counterclaim - Brendan Siva & Aida; M/s Brendan Siva* F
- Reported by Sandra Gabriel*

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is a writ action seeking damages under the tort of abuse of process and the tort of conspiracy. There is also a counterclaim for unjust enrichment and for the setting aside of an order of the High Court. After a full trial, I allowed the main claim and dismissed the counterclaim. H

[2] This judgment sets out the full reasons for my decision and contains discussions on the scope of the tort of abuse of process and the torts of lawful means and unlawful means conspiracy.

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A Key Background Facts

[3] There is long history to this dispute. It found its origin in the agreement entered into between the plaintiffs and the second defendant in 2002 concerning the purchase of plantation lands by the former, which relationship eventually turned litigious in 2007. A series of court proceedings ensued, the decisions on some of which have also been reported. These include the Federal Court decision in *Yong Toi Mee & Anor v. Malpac Capital Sdn Bhd & Anor* [2013] 8 CLJ 725 and the Court of Appeal decision in *Malpac Capital Sdn Bhd v. Yong Toi Mee & Ors and Another Appeal* [2016] 8 CLJ 613.

[4] A detailed narrative of the facts would therefore be neither necessary nor economical for the purposes of this judgment. But some background facts are essential, *albeit* chronologically stated in summary fashion in the following several paragraphs.

[5] The plaintiffs are business individuals who entered into the relevant agreement to purchase the plantation assets of the second defendant as part of the overall restructuring of the first defendant under the auspices of Pengurusan Danaharta Malaysia Berhad. The first defendant is a locally incorporated public company listed on the Main Board of Bursa Malaysia. It is an investment holding company. The second defendant is a private company which is wholly-owned by the first defendant.

[6] The third to the ninth defendants are all directors on the Board of the first defendant at the material time, with the eighth defendant being the chairman. The tenth defendant is the chief executive officer of both the first and second defendants.

[7] In the counterclaim filed by the second defendant, reliefs were sought against the two plaintiffs as the first and second defendants, Sri Ganda Oil Mill Sdn Bhd (“Sri Ganda”) as the third defendant, being a company controlled by the first plaintiff (first defendant in the counterclaim), and Radiant Response Sdn Bhd (“RRSB”), as the fourth defendant, being the company which had been nominated to hold the subject plantation assets following the restructuring, which shares had been purchased by the plaintiffs.

[8] The crux of the case of the plaintiffs herein, and the basis for their action under the torts of abuse of process and conspiracy is that the relevant defendants refused to comply with the decisions of the courts by continually, in their institution of subsequent and different proceedings, seeking, among others, to set aside the decree of specific performance on the purchase of the plantation assets against them granted on 5 May 2011 by the High Court in Ipoh High Court Suit No. 22-109-2007 (“HC Judgment Suit 109”).

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[9] A key decision of the HC Judgment Suit 109 is that the purchase of RRSB (which was to hold the plantation assets) by the plaintiffs concerned the entire share capital of RRSB and was not only limited to 2 shares in RRSB which at the time of execution of agreement constituted the entire capital of RRSB. Thus the purchase by the plaintiffs encompassed the subsequent increase in the share capital of RRSB (being a requirement of the relevant licensing authority) from 2 to 100,000 ordinary shares in RRSB.

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[10] The HC Judgment Suit 109 which was in favour of the plaintiffs which then obtained the order for the specific performance for the completion of the purchase of the plantation assets was subsequently reversed by the Court of Appeal.

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[11] The Federal Court on 4 September 2013 however restored the HC Judgment Suit 109, and directed the plaintiffs to make payment of the balance purchase price within one month (“the FC Judgment Suit 109”) (see *Yong Toi Mee & Anor v. Malpac Capital Sdn Bhd & Anor* [2013] 8 CLJ 725 referred to earlier). Despite the plaintiffs’ conduct towards compliance with the FC Judgment Suit 109, the second defendant refused to complete and instead filed for a review application on 3 October 2013 to the Federal Court against the FC Judgment Suit 109. The review application was dismissed by the Federal Court on 4 March 2014 (“the FC review”).

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[12] Efforts by the plaintiffs to complete the purchase after the FC review continued to be unsuccessful as the first and second defendants then sought legal opinions, despite the FC Judgment Suit 109 and the FC review. The Board of the first defendant on 23 April 2014 resolved to convene an extraordinary general meeting (EGM), to seek its shareholders approval for, among others, the disposal of the additional shares of 99,998 in the enlarged capital of RRSB, and the mill at the plantation lands to the plaintiffs, whilst the Board agreed to regulate an interim position with the plaintiffs on the basis of their ownership of only the 2 shares in RRSB.

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[13] The plaintiffs thus felt compelled to seek enforcement of the specific performance which, as had been decided by HC Judgment Suit 109, FC Judgment Suit 109 and the FC review, concerned the entire share capital of RRSB, not just the 2 shares. The plaintiffs filed a notice of application at the Ipoh High Court for orders to give effect to the specific performance (“encl. 62”). At the EGM held on 31 July 2014, the said proposed disposals to the plaintiffs failed to secure the approval of the shareholders of the first defendant.

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[14] On 22 September 2014, the second defendant filed a cross-application at the Ipoh High Court (“encl. 69”) requesting the Ipoh High Court to determine certain threshold questions and issues of law, but clearly to seek the discharge of the specific performance on the strength of the alleged

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- A absence of shareholders' approval under s. 132C for the disposal of the additional shares in RRSB and the mill to the plaintiffs. It also sought to set aside the same on the basis that the sum of RM36.7 million was due from the plaintiffs in respect of the management of the plantation lands and the mill.
- B [15] On 17 February 2015, the Ipoh High Court allowed encl. 62 for the plaintiffs and dismissed encl. 69 against the second defendant, who appealed against both these decisions. On 15 August 2015, the second defendant's appeal was dismissed by the Court of Appeal (see *Malpac Capital Sdn Bhd v. Yong Toi Mee & Ors and Another Appeal* [2016] 8 CLJ 613 referred to earlier).
- C [16] The order of the High Court allowing encl. 62 included the appointment of the plaintiffs as the directors of RRSB and removal of the latter's then existing directors, the payment by the plaintiffs of RM49 million inclusive of the additional shares of 99,998 and for the Deputy Registrar be authorised to execute relevant documentation, including the share transfer forms, to give effect to the orders, and thus the specific performance and completion of the purchase of the plantation assets.
- D [17] Following the dismissal of the appeal by the Court of Appeal in respect of these encls. 62 and 69, the second defendant sought leave to appeal to the Federal Court. This was refused on 13 February 2017.
- E [18] That was however not the end of the matter.
- F [19] Enter the first defendant, the second defendant's parent, for the first time, officially. The dispute has now moved inter-state to Kuala Lumpur. The first defendant filed on 15 April 2016 suit WA-22NCC-145-04-2016 ("Suit 145") in this court as plaintiff, and the second defendant claimed to be a nominal party as the first defendant. Suit 145 sought guidance from this court on the legal implications of the absence of the s. 132C approval given the rejection of the proposal on the transfer of the 99,998 shares, to complete the purchase and give effect to what was first granted by the HC Judgment
- G 109.
- [20] On 4 August 2016 subsequent to the filing of the Suit 145, the plaintiffs commenced this instant proceeding, responded to by the second defendant by the filing of the counterclaim.
- H [21] In the instant counterclaim, the second defendant as the plaintiff is seeking for various declarations and reliefs, including an account for profit share and rental for the plantation lands and the related mill from July 2011 for the sum of RM43,045,551.38, unjust enrichment on the part of the plaintiffs in respect of the increased share capital in RRSB, the need for approval under s. 132C of the Companies Act 1965 for the transfer of 99,998
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shares, that the same shares be restored to the second defendant, and that the High Court decision on encls. 62 and 69 dated 17 February 2015 granted to the plaintiffs be impeached on the ground of fraud.

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[22] This court on 11 April 2017 dismissed the claim of the first defendant in Suit 145.

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The Trial And The Witnesses

[23] The instant case before me was originally filed by the plaintiffs in the Civil Division of the High Court *vide* suit WA-22NCVC-486-08-2016. Following agreement of parties, the action was then transferred before me, by reason of the related proceedings then already pending in this court in Suit 145. Following the transfer, this action was registered as WA-22NCC-326-09-2016 ("Suit 326"). I ordered that the instant Suit 326 be heard after Suit 145 which by then was already ready for trial, and that evidence in the latter should stand as evidence in the former.

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[24] The trial for this Suit 326 was held over three days in February 2017.

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[25] In the main action, the plaintiffs called five witnesses, as follows:

- (a) The first plaintiff himself as PW1;
- (b) The second plaintiff as PW2;
- (c) Goh Ah Peng, director of Sri Ganda Oil Mill Sdn Bhd as PW3;
- (d) Sathianathan a/l ER Nair, an expert witness, as PW4; and
- (e) Yeo Chai Seng, also an expert witness, as PW5.

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[26] The defendants, all ten of them, called only one witness, namely Ang Poo Guan, the CEO of the first and second defendants, as DW1. DW1 is also the tenth defendant.

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[27] In the counterclaim, the second defendant, as the plaintiff, called two witnesses, namely Lee Chee Seong, the project and investment manager of the second defendant as PW1/CC and the tenth defendant or DW1 in the main action as PW2/CC.

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[28] All the four defendants in the counterclaim called the first plaintiff/PW1 as their only witness as DW1/CC.

The Summary Of The Contentions Of The Litigants

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[29] In the main claim, the plaintiffs' case of tort of abuse of process is brought against the first and second defendants only. The claim of tort of conspiracy is levelled against all the ten defendants.

[30] The essence of the case of tort of abuse as advanced by the plaintiffs is that the institution of the various proceedings, after the authoritative pronouncements by the apex court in the FC Judgment Suit 109; specifically

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- A the FC review, encls. 62 and 69 and Suit 145 was in truth done for the dominant purpose of refusing to accept the FC Judgment Suit 109, thus insisting on the discharge of the specific performance, restraining the plaintiffs from enforcing their legal rights, demanding more money from them, as well as preserving the core business of the first defendant and
- B avoiding the imposition of the PN 17 company status under the listing requirements of the stock exchange.

- C [31] The tort of conspiracy against all defendants is anchored on the existence of a combination or agreement of the defendants, given the proximity of their relationships, by the carrying out of acts with the object of injuring the plaintiffs. The plaintiffs submitted that there was sufficient evidence of the existence of the requisite intention to cause injury by reason of the acts in questions having been directed against the plaintiffs to prove the tort of unlawful means conspiracy and there was additionally, as inferred from evidence, a pre-dominant motive to cause injury to the plaintiffs, which
- D included the denial to the plaintiffs of the fruits of litigation by circumventing their right to enforce the various judgments and orders, that constituted lawful means conspiracy.

- E [32] The first defendant, in opposing the claim, submitted that principally, the tort action for abuse of process must require proof, in addition to the improper purpose, of the deployment of the relevant process, in furtherance of that purpose, by way of an overt act or threat distinct from the pursuit of the proceeding itself according to its ordinary use. This, according to the first defendant, the plaintiffs have failed to demonstrate, and that Suit 145 was pursued by the first defendant in accordance with its ordinary course.
- F Neither had the plaintiffs proven that Suit 145 had been pursued by the first defendant for the predominant improper purpose of securing any collateral advantage. The Suit 145, so the first defendant argued, had been filed with the single and predominant purpose of seeking redress through the legal process, given the purported predicament encountered by the first defendant on the implications of the absence of the s. 132C shareholders' approval.
- G Neither had the plaintiffs suffered any injury in any event.

- H [33] The first defendant further asserted that in respect of the tort of conspiracy, in the main, the plaintiffs have failed to establish any combination or agreement between the defendants, failed to prove any overt act on the part of the third to tenth defendants, did not show any unlawful means on the part of the first defendant, and that there was no evidence that the intention of the first defendant filing Suit 145 was to injure the plaintiffs.

- I [34] The second defendant, in adopting the submissions of the first defendant further emphasised that the facts did not support any collateral purpose but instead showed a genuine legal recourse with legal advice. The

tort of abuse cannot be sustained without evidence of some overt act by the second defendant and of a predominant purpose to secure a collateral advantage outside of the court proceedings. The tort of conspiracy, according to the second defendant, cannot, based on case-law, succeed unless the requirements of the tort are strictly met by clear, positive and convincing evidence which was not the case herein. Importantly it was also argued that there was no agreement in the context of one between the second defendant and true outside parties, instead of the first defendant's own directors and CEO, who are the third to the tenth defendants.

[35] The third to the tenth defendants, against whom the claim of tort of conspiracy was made, contended that unlawful means was not established, intention to injure not shown, alleged intention not in any event achieved, and no damages suffered. Their key opposition to the tort of conspiracy claim is that the plaintiffs have clearly failed to fulfil the requirement of an agreement between two or more individuals since there were no multiple minds in play as between the first and second defendants on the one hand, and the third to the tenth defendants, being their own directors and CEO, on the other hand.

[36] In respect of the counterclaim, the second defendant as the plaintiff argued principally that the decision of the High Court on encls. 62 and 69 was obtained by fraud which subsequently came to light in the evidence of the first plaintiff during his cross-examination in the Suit 145; and that there was new evidence in the form of admissions made in the accounting treatment recorded in the financial statements of the third defendant in the counterclaim.

[37] The plaintiffs in the main action and the other defendants in the counterclaim countered such contentions, submitting instead that the first plaintiff did not make any admission about the absence of any agreement to for the enlarged share capital in RRSB and that the plaintiff in the counterclaim could have obtained the said financial statements to be tendered in earlier proceedings. Most importantly, it was argued that the reliefs prayed for in the counterclaim are in any event already *res judicata*.

[38] I will now examine the issues.

Evaluation And Findings Of This Court

The Tort Of Abuse Of Process – The Elements

[39] The dissenting judgment of Lord Denning MR in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478, often regarded as a good starting point for any discussion on this subject, held as follows:

In a civilised society legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just

- A claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
- B [40] It is an actionable tort, according to Lord Denning MR, if the legal process is abused in order to instead oppress or extort, or exert pressure to achieve an improper end. This formulation has since been adopted in Malaysia, in the leading authority on the law governing the tort of abuse of process in the Court of Appeal decision in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425 which in the judgment delivered by Gopal Sri Ram JCA (as he then was) held that the essence of the law is that it is an abuse of process where the process of the court is invoked not for the genuine purpose of obtaining relief claimed, but for a collateral purpose, such as to oppress a defendant.
- C [41] His Lordship in *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* had also set out the essential elements of the tort of abuse of process, as follows:
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- E (1) The process complained of must have been initiated;
- F (2) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process;
- G (3) The plaintiff must have suffered some damage or injury in consequence.
- It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.
- Overt Acts Separate From Legal Process Not Substantive Element*
- H [42] The primary argument of the first and second defendants is that there can be no tort of abuse because, in addition to the improper purpose, the plaintiff must also prove any overt act or threat distinct from the court proceedings in their ordinary course. The defendants refer to various largely Australian authorities which were reviewed by the New South Wales Court of Appeal in *Maxwell-Smith v. S & E Hall Pty Ltd* [2014] 308 ALR 149 to support their argument that the party alleging the tort must show the overt acts or threats which are distinct from the pursuit of the litigation process.
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[43] Having reviewed the authorities on this issue, I am of the view that this contention of the defendants is misconceived. Instead, properly formulated, such overt act or threat serves only to constitute evidence of the improper purpose of pursuing the legal process. It cannot be a substantive or separate legal element for the tort because it is clear from *MBSB v. Ungku Nazaruddin* and the Privy Council decision in *Crawford Adjuster and others v. Sagicon General Insurance (Cayman) Ltd and another* [2013] 83 WIR 257 as well as the ruling of the High Court of Australia in *Williams v. Spautz* [1992] 107 ALR 635, all of which held that the abuse may be the inevitable objective inference from the surrounding circumstances; and most fundamentally, the abuse can also be shown by the very steps being taken in the courts.

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[44] As stated by *Ungku Nazaruddin*, in the judgment of Gopal Sri Ram JCA (as he then was):

On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is a wrong known to the law.

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[45] This position is also entirely consistent with a much later decision by the Privy Council in *Crawford Adjusters* where Lord Wilson said thus:

But, in so far as in some quarters the overt act or threat has taken route not just as having likely the evidential importance but as being a substantive requirement, whether for the defendant's application or for the claimant's tort, I struggle to understand the reason for it.

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[46] Lord Sumption, in the same case similarly expressed the position, in the following terms:

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It is sometimes said, for example in *Fleming's Law of Torts* (10th edn. 2011) p 708, that in addition to the extraneous purpose, it is necessary to prove some 'overt act' other than the proceedings themselves, such as the extortionary threat in *Grainger v. Hill*. The better view, however, is that this is not an additional requirement but merely evidence of the extraneous purpose. As Mason CJ and Dawson Toohey and McHugh JJ observed in *William v. Spautz* (at paragraph 41), in practice 'the conclusion which the court reaches is more likely to be founded upon objective evidence rather than subjective evidence of intention'. In the great majority of cases, an overt act may be the only way of proving the abuse. But it is not a legal element of the tort. The abuse may sometimes be the inevitable inference from the surrounding circumstances, as it was in *Dr Spautz's case*. (emphasis added).

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[47] Thus, the essence of the law on the tort of abuse of process as it applies in this country, as pronounced by the Court of Appeal and consistent with other leading English authorities, is the fundamental test of whether the legal process was utilised for some improper or ulterior purpose other than to seek

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A a genuine redress in respect of which the process offers. There is no additional legal element or substantive requirement of the tort of abuse of process which requires any overt act or threat be shown, which is separate from the legal process or the improper purpose.

B [48] But this is not to say that such overt acts or threats, if they exist, are irrelevant. After all, the cornerstone of legal proceedings in all justice system, ours is no exception, is the adequacy of evidence. The overt acts and threats instead constitute evidence towards proving the presence of the improper or collateral purpose. Their importance are evidentiary in nature *vis-à-vis* the element of improper purpose.

C [49] As for the meaning of improper purpose, the often quoted explanation is that of Isaac J in the High Court of Australia in *Varawa v. Howard Smith Co Ltd* [1911] 13 CLR 35 who had helpfully described improper purpose in the following terms:

D ... if the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose.

E [50] This description was referred to by Lord Wilson in *Crawford Adjusters* who further elaborated on the term of improper purpose as follows:

F The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper; for it is nothing other than to achieve victory in the action with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall – or some other disadvantage to the defendant or advantage to himself – by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper ...

G [51] The following passage from the judgment of Lord Sumption in the same case on the point is no less instructive:

H The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some *wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought*. The paradigm case is the use of the processes of the court *as a tool of extorting, by putting pressure on the defendant to do something wholly unconnected with the relief, which he has no obligation to do*. (emphasis added)

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Improper Purpose Established

[52] Having reviewed the history of the litigation and the evidence relating thereto, in my judgment, there can perhaps be no clearer example of a situation, like presently, where, despite the appearance of legitimately pursued court proceedings, the purpose underlying the pursuit thereof is nothing but proper. This, on the authority of *Ungku Nazaruddin* is sufficient to sustain a claim of tort of abuse of process. For it needs no reminding that the genesis of the instant claim for tort of abuse of process is Suit 109. That Suit 109, instituted by the plaintiffs in 2007 concluded with the FC Judgment Suit 109 on 4 September 2013 reinstating the HC Judgment 109, principally, among others for the specific performance of the relevant purchase agreements and the purchase of the entire capital of RRSB.

[53] Despite the finality of that decision of the apex court in this country, the first and second defendants chose to commence various other proceedings, one after the other, which predominant relief unmistakably included the setting aside of the decree of specific performance. It started with the FC review, then the cross-application in encl. 69 and later the Suit 145. All sought to achieve the same objective.

[54] In my view, they constitute, individually and collectively a clear collateral attack on the judgments of the High Court and the Federal Court in Suit 109. The Suit 145 had the additional design of attacking the High Court and the Court of Appeal judgments on encls. 62 and 69.

[55] I cannot do better than reproduce parts of the grounds of judgment of the High Court and the Court of Appeal in respect of encls. 62 and 69 to show the extent of the finding of the sheer unnecessary of those proceedings in the first place.

In the High Court in respect of Enclosure 62

[44] The first defendant exhausted all avenues to appeal. It refused to accept the payment tendered for the balance of the purchase price after the Federal Court dismissed the review application. The first defendant chose to act in defiance of the decree of specific performance by disobeying the courts' judgment. In that situation, the plaintiffs have all the right to apply for further direction from the court to complete the purchase. The plaintiffs had been waiting for so long to reap the fruits of their fruitful litigation. The court can no longer deny or delay such right.

In respect of Enclosure 69

[39] ... All avenues of appeal have been exhausted. Judgment of the Federal Court is final and conclusive. Therefore the Court had to agree with the plaintiffs' counsel assertion that the first defendant is indeed flogging a dead horse ...

- A [40] All issues raised by the first defendant were taken up or supposed to be taken up before the Federal Court in the substantive appeal or on the review application. It needs to emphasise that the decision of the High Court had been affirmed by the Federal Court. It cannot be re-visited under any guise in any subsequent proceedings. The decision of the apex court is final and the losing parties should not try to manoeuvre around it, however unhappy they are. Due respect should be given to the High Court's decision which was affirmed by the Federal Court. The so-called threshold questions and related issues raised by the first defendant on which the court has to address are neither new nor noble.
- B
- C [56] And these are some of the pointed observations expressed in the grounds of the judgment of the Court of Appeal, as delivered by Mohd Zawawi Salleh JCA, and also reported in *Malpac Capital Sdn Bhd v. Yong Toi Mee & Ors and Another Appeal* [2016] 8 CLJ 613; [2016] 5 AMR 73:
- D [15] We have no difficulty in accepting the proposition above. However, on the factual matrix of the case before us, we agree with the JC's conclusion that the decision of the Federal Court had finally disposed of the rights of the parties. Therefore, the controversy in respect of the rights and obligations between the parties had ceased to have an independent existence because they "merged" in that final judgment pronounced by the Federal Court. Further, this merger has long been treated as equating to "*res judicata*" in the strict sense.
- E [16] We disagree with the submission of learned senior counsel for the appellant that after the conclusion of the appeal proceedings, there are two broad subsequent issues to be resolved by the court, namely:
- F (a) the issue of the subsequent additional 99,998 shares; and
(b) the non-payment of profits to the appellant as owner of the plantation assets before actual completion of the agreement.
- G [17] We are of the view that the above issues had already been adjudicated on the merits. Therefore, they ceased to have independent existence and merged in the final judgment of the Federal Court. *The appellant should not be allowed to re-open the matter or to have the court re-consider its conclusion. This is because of the public interest in the finality of litigation. Without finality, the process and cost of litigation would be never-ending, as parties would forever be returning to the court to re-argue the case and for tactical advantage.*
- H [18] We agree with the written submissions of learned counsel for the first and second respondents that **the present round of litigation is unnecessary and is brought about by the appellant refusing to accept the judgment of the Federal Court.** This is a repetition of the same ground that the appellant advanced in the review application before the Federal Court. The doctrine of *res judicata* should be invoked.
- I (emphasis added)

[57] In the subsequent Suit 145 brought by the first defendant which I had dismissed, by reason principally of *res judicata*, I had stated the following in my grounds of judgment:

[119] The pronouncements of the High Court and the Court of Appeal as extracted above could not have been expressed any more clearly. Yet, notwithstanding these fairly strongly worded rulings, the same issues are re-introduced in the instant suit, this time by the first defendant's parent, the plaintiff herein. As such, since the issue of the two shares against the entire issued capital had been judicially determined in Suit 109, the subsequent adjudication of the same issues in Enclosures 62 and 69 was unsurprisingly determined by the High Court and the Court of Appeal as very clearly articulated in the respective grounds of judgment to be prohibited by *res judicata*.

[120] Accordingly, the fresh attempt by the plaintiff in this suit before this Court to raise and revisit the very same issue cannot succeed and must suffer the same fate. This is regardless of how the plaintiff in this instant suit sought to re-formulate and re-characterise its true complaints.

[121] From the issue of the additional shares which was then resurrected in a different package as the Section 132C concern, all have been previously judicially addressed and determined. The grounds of judgment of the Court of Appeal are especially specific in the ruling on the non-relevance of Section 132C because of the finding, among others, that the holding company, being MHB or the plaintiff herein had earlier already given its approval for the substantial disposal of its assets then held by MCSB to the Purchasers in 2002. As such, it is so plainly not open for the plaintiff now to again seek a repeat re-litigation of the same issues.

...

[156] It seems clear to me that the plaintiff in truth sought to invalidate the entire transaction in order to retain the Plantation Lands and avoid the potentially adverse consequences of being a listed company without core business under the Main Market Listing Requirements. If the plaintiff had genuinely wanted to seek guidance and protection *vis-à-vis* the possible implication of a breach of Section 132C, instead of masquerading in this fashion, embarking on this perilous and circuitous journey purportedly to quell any potential Section 132C set back, the plaintiff could have for example resorted to a more direct approach, by getting its own directors to apply for relief from the Court under Section 354 of the CA in respect of any proceedings for negligence, default, breach duty or breach of trust.

...

[159] The present claim cannot be characterised as any other than an unmitigated form of a collateral attack of the earlier judgment of Suit 109 by the High Court, affirmed by the Federal Court not once, or even twice, but effectively a staggering three times given the review proceedings, inclusive of those on the Enclosures 62 and 69. In short, this suit by the plaintiff cannot succeed and must fail.

A **[58]** I am satisfied that on the totality of evidence, these proceedings, in respect of the FC review, and especially encl. 69 as well as the Suit 145, may even, by themselves, be construed as the overt acts and threats that evidence the abuse. By their conduct in instituting these various actions, the plain inference is that the first and second defendants decided not to comply with the judgments which did not go their way, knowing that in the process the plaintiffs have been unjustifiably denied of their fruits of litigation.

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C **[59]** For despite the FC review, and the clear pronouncements of the High Court and the Court of Appeal in their respective judgments in respect of encls. 62 and 69 expressed in no uncertain terms against the second defendant's refusal to accept the judgment of the Federal Court, the defendants initiated their latest, though not by any means the final instalment in this series of unnecessary legal process, by finally featuring the first defendant in the filing of Suit 145 which has also been dismissed by this court. The process was invoked in instalments. And the reliefs sought in these proceedings are for all intents and purposes a variation of the same thing.

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E **[60]** At first, the focus of the second defendant was on the argument that their counterclaim was not considered by the High Court in Suit 109, which is absolutely untenable in light of the decision granted on the main claim against the second defendant. Then, the disputation morphed into the argument that the judgment concerned the transfer of only two shares in RRSB which was also wholly without merit; and finally on the need for the EGM approval for the first defendant under s. 132C, which had also been held to be unsustainable.

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G **[61]** All these had been raised, either directly or with a varying degree of emphasis, by the defendants from the time of the second defendant's review application to the Federal Court, and subsequently persistently and continually repeated in encls. 62 and 69 proceedings and then, yet again, the Suit 145. The final attempt, at least to date, is the counterclaim in the instant Suit 326 itself.

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I **[62]** All these are no ordinary course of litigation. The first and second defendants in the main persisted in their contention that the HC Judgment Suit 109 concerned only two shares in RRSB and insisted that a further shareholders' approval for the transfer of the 99,998 RRSB shares to the plaintiffs was legally necessary; clear judicial pronouncements to the contrary notwithstanding. This is most plainly demonstrated, other than in various courts and other documents, in the testimony of the first defendant's main and only two witnesses in Suit 145 who claimed to respect court decisions but for all intent and purposes refusing to accept them at the same time.

Improper Purpose To Deny Fruits Of Litigation

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[63] The design of this litigation is manifestly to achieve a purpose other than a genuine redress that the process actually offers. The dominant and collateral purpose for which these proceedings were initiated was to achieve a result not intended by the invocation of the process, which in this case had been to delay and altogether deny the fruits of the litigation to the plaintiffs (therefore causing damage and injury to them, see further below), by using the court process which in the first place is intended to achieve justice, to instead attain the complete opposite, and more so at the same time in the process, openly refusing to obey the decisions of the courts.

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[64] The purpose sought to be secured by the first and second defendants thus also included, as pleaded by the plaintiffs, discharging the specific performance, restraining the rights of the plaintiffs to give effect to FC Judgment Suit 109, preserving the core business of the first defendant group and avoiding PN 17 status, as well as demanding more monies from the plaintiffs allegedly due to the second defendant for the enlarged capital in RRSB and under the management arrangement ie, the mill on the plantation lands.

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Conduct And Acts Showing Improper Purpose

[65] As correctly highlighted by the plaintiffs, in furtherance of the improper purpose, the first and second defendants pursued the following conduct, despite the finality of the FC Judgment Suit 109, and not to mention the subsequent decisions on encls. 62 and 69, and the Suit 145, effectively denying the fruits of litigation to plaintiffs:

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- (a) Refused to accept payments of the balance purchase price (by returning the bank drafts and not furnishing company books) to complete the purchase by the plaintiffs;
- (b) Filed court applications and suits one after the other, in instalments;
- (c) Set the stage for further litigation by claiming to later having the benefit of legal opinions on issues already adjudicated on; and
- (d) Convened the EGM, and issued the Circular with a disclosure done in a fashion that led to the rejection of the proposal by the shareholders, yet again providing a pretext for further legal proceedings despite the matter, this time on s. 132C, having been adjudicated on earlier as well.

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Injury To Plaintiffs

[66] All legal process was thus utilised with the improper purpose of denying the plaintiffs the fruits of their litigation, thus causing injury to their interests. They had lost the opportunity to maximise yield and income from the plantations and the mill during the period that they should have been the

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- A true and lawful owner of the same, and had expended unnecessarily on inefficient infrastructure and machineries at the mill when they could have invested more cost efficiently early on instead (see further below on injury to the plaintiffs, which is similarly relevant to the discussion on the tort of conspiracy).
- B [67] I should reiterate that, notwithstanding that the abuse in this instant case could in my judgment as stated earlier be shown by the very steps being instituted in the courts such that the proceedings themselves – the FC review, encl. 69 and the Suit 145 are sufficient to found a successful action for the tort of abuse of process, having regard to the observations of Lords Wilson
- C and Sumption in *Crawford Adjusters*, these facts and circumstances (as outlined in the preceding two paragraphs), which are strictly extrinsic to the legal process and originate from the first and second defendants' refusal to accept the FC Judgment Suit 109, could, objectively evaluated, be validly construed to be the overt acts and threats that further fortify the evidential premise for
- D the finding of the existence of the improper or collateral purpose, which had harmed the economic interests of the plaintiffs.
- [68] This is plainly an unjustified and unlawful tortious conduct which constitutes the tort of abuse of process, pure and simple. I cannot envisage a situation more dire than the case now before me, which integrates in the
- E tort of abuse of process, the terror twins of denial of fruits of litigation, and blatant refusal to respect the judgments of the courts. These strike at the heart of the core of the justice system which the court process seeks to promote, but unnecessarily attacked by the first and second defendants in the instant case.
- F [69] None of the arguments presented by the first and second defendants in defending the claim by the plaintiffs is in my view meritorious. Thus, it is not open to the first defendant to contend that the failure or downfall of the plaintiffs would in any event be a natural consequence of the former succeeding in the Suit 145 given the fact that the latter had actually won the
- G FC Judgment Suit 109, and have repeatedly achieved similar success in the successive judgments in the FC review and in respect of encls. 62 and 69.

Reliance On Legal Opinions Untenable

- H [70] Much had been said by the defendants about their alleged reliance on legal opinions to justify their commencement of encl. 69 and the Suit 145. In the first place, I am not convinced of the genuineness of the concerns on s. 132C which led to the request for advice, since, as confirmed by DW1 himself in cross-examination, this issue had been raised, without success, as early as in the application for review at the Federal Court by the second defendant, and both defendants were advised by the same lawyers. This thus
- I suggests that the defendants purposely and purportedly introduced a new

issue for litigation when the very issue had already been adjudicated on. It was well and truly *res judicata*, as further reaffirmed in my decision on the Suit 145. A

[71] More significantly, I struggle to fathom, let alone accept, how when faced with a clear judgment of the court – pronounced on more than one occasion – on the one hand, and a belief to the contrary however honestly and earnestly felt to be genuine on the other hand, the defendants being companies, directors and a CEO no less in a listed group, decidedly and persistently chose the latter. In my view, the law must swiftly strike down any position of litigants which is premised on their refusal to accept the judgments of the courts, more so if this could be detected in a tortious claim of abuse of process, where judgments are disregarded by, ironically the institution of further proceedings. B C

Refusal To Accept Court Judgment Clear Evidence Of Abuse And Is An Abuse

[72] As if the conduct of the first and second defendants in their filing of the various proceedings is not obvious enough an abuse of process, the evidence given by the chairman and CEO of the first defendant more than abundantly corroborates this blatant abuse. I think it is therefore apposite that the relevant exchanges in cross-examination involving the testimony of DW1 (the CEO of both the first and second defendants) in this Suit 326 and those of the same DW1 in the Suit 145 (also as DW1) and of the chairman of the first defendant, as PW1 in the Suit 145, be reproduced hereunder to demonstrate the brazen audacity of their stance. D E

PGN (Plaintiffs' Counsel): Ok. So by filing this suit here you are raising the same issues that have been resolved by the Federal Court and which the Court of Appeal has now said have been resolved by the Federal Court. Am I right? F

MUHAY (Chairman): Yes, but our position is that we still have to seek the shareholders' approval based on the Listing Requirements.

PGN: Ok. I am putting it to you that all of those issues and the issue that you say still requires shareholders' approval have been matters that have been resolved by the Court of Appeal and Federal Court both in Suit 109 and the dismissal of your cross application. G

MUHAY: I am not disputing that. H

PGN: Absence of approval by the shareholders. I am just going to put it to you that the High Court and the Federal Court have decided this, that the fact that there was no need for a further approval by the shareholders.

MUHAY: But I was advised by my lawyer to say that we need the shareholders' approval. I

- A ...
- PGN: My question is simple. Did the Court decide on these issues? That's all. Did the Court dismiss all your applications?
- ANG (CEO): **The Court made the decision but our threshold questions were not answered.**
- B
- PGN: But the Court did say that that was not important. Am I correct, Mr Ang? The CPs have been met. Am I correct?
- ANG: Well, for reason best known to the Court.
- PGN: Yes.
- C
- ANG: Otherwise we won't be here today, My Lord.
- PGN: Yes, so you are saying the Court was wrong?
- ANG: I cannot say the Court was wrong. I have to respect the decisions of the Courts.
- D
- PGN: Thank you. Then we leave it as that.
- ANG: **But we need not necessary agree.**
- ...
- PGN: Right. Now let's look at your Question and Answer 5A.3. This is your answer to the question therein the subsequent Enclosure 69, which is the cross application was thereafter filed by MCSB in September 2014 as a cross application to that Enclosure 62. ... Now what you mean by a continued limited jurisdiction had by the High Court?
- E
- ANG: I take it to mean that the, in Enclosure 62.
- PGN: You take it to mean meaning, these are your own words, what does it mean?
- ANG: Ok. I rephrase my answer, what I mean here is that **the Court had limited jurisdiction in the sense that it can only interpret what is stated in the Court Order and nothing more.**
- F
- G
- PGN: So from your legal advice, you take it to mean that this judgment of the High Court and Federal Court in Suit 109 is only for two shares?
- H
- ANG: Yes.
- PGN: Right. I put it to you, that it's this sort of statement, Mr Ang, and the CEO of Capital and Holdings, which further demonstrates your defiance of the judgment of the Court. (emphasis added)
- I
- ...

[73] Their reliance on legal advice, even if true, is one striking example of why the conduct cannot be genuine or done in good faith, because what the legal position is has been made more than abundantly clear by the Federal Court no less, such that an opinion on what the legal position ought to be on the applicability and implications of s. 132C is clearly secondary if not entirely irrelevant in the context.

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[74] The conduct of the defendants in this regard is plainly an abuse since it is engendering non-acceptance of judgments of the courts that cannot be countenanced in any circumstances. I must stress that judgments of the courts must be obeyed not merely for the sake of ensuring respect for the courts. It is essential for the higher and larger purpose that it underpins the administration of the system of justice. Acts or conduct which serve to undermine the integrity of the system erode confidence in the judicial institution that would in the process harm the nation's constitutional democracy, its governance by the rule of law and deny the fundamental tenets on the supremacy of the Constitution.

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[75] It is therefore no justification that the defendants pursued the litigation, especially encl. 69 and the Suit 145 upon legal advice. This is not to mention that the relevant opinions themselves are not tendered in evidence to prove what the advice actually entailed. Respect for legal professional privilege notwithstanding, there is absolutely nothing in evidence to show what the recommended course of action was. Yet the defendants are basing their main contention that their resort to the proceedings was to seek genuine redress on the overriding basis of the legal opinions.

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[76] Again, it bears repetition that the pertinent legal opinion referred to by the first defendant, which concerns the issue of s. 132C approval was procured after the same argument had been raised and dismissed by the Federal Court in the FC review. I do not think that this court can simply accept the defendants' contention that the opinion was in fact rendered and the decisions made in reliance thereon are therefore business judgments. That is not how the law ought to be applied and neither does the argument promote good corporate governance and greater Board accountability.

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Issues With EGM Circular

[77] There are also concerns with the Circular dated 8 July 2014 issued in conjunction with the EGM, the result of which was the overwhelming rejection by the shareholders of the transfer of the additional shares in RRSB. This conveniently became the pretext for the second defendant challenging encl. 62 and initiating encl. 69, and soon after, the first defendant's filing of the Suit 145.

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A [78] First, the Circular was prepared and issued as what is known as an exempt Circular under the listing requirements of Bursa Malaysia Securities Berhad (“Bursa Malaysia”) which meant that shareholders’ approval was unnecessary. Yet the issue for consideration of the EGM was the disposal of the core business of the first defendant which the listing requirements plainly stipulate the need for shareholders’ approval.

B [79] In the EGM Circular, the risk of the first defendant being classified as a PN 17 company following completion of the proposed disposal (the purchase of the plantation lands and mill by the plaintiffs) was highlighted, as was the risk of being de-listed altogether in the absence of any regularisation plan to address the same.

C [80] And the insignificant business operations argument is the premise of its submission on the need for shareholders’ approval under s. 132C. The disclosure therein stated in no uncertain terms that the Board of the first defendant had not identified any suitable investments and that DW1 in the
D Suit 145 agreed that completion of the transfer of the additional shares and the sale of the mill on the plantation lands would result in the loss of its core business. This would consequently lead to the removal of the first defendant’s listing status, mandating compliance with Chapter 10.11A of the listing requirements. Adherence to Chapter 10.11A required the
E appointment of a main adviser and an independent adviser, none of whom was appointed for the Circular of the EGM.

F [81] Further, whilst I accept the argument of the first defendant that under the new Chapter 8.03A, an insignificant or loss of business operations would not automatically result in a PN 17 classification or removal of listing status pending submission of a regularisation plan, the evidence of DW1 in the instant Suit 326 confirmed that the company had not found a new business on immediate basis, and was still treating the plantations as its core business.

G [82] Unusually, the Board also refrained from making any recommendations, said to be by reason of the HC Judgment Suit 109. Neither were the implications of the Federal Court judgments in the FC Judgment Suit 109 and the FC review clearly disclosed. Yet the first and second defendants in the instant suit changed stance and now allege that the PN 17 status is due to the plaintiffs’ failure to pay rentals and profits when clearly that was no longer an issue after the HC Judgment Suit 109.

H *Improper Purpose Included Retaining Core Business*

I [83] Another contradiction is the disclosure in the consultation paper to Bursa Malaysia on the plan to regularise its lack of core business by way of the development of certain Johor Bahru lands which had been stated to have been conceptually advanced in status and ready for regulatory submission within a period of one year. But, at the same time, the shareholders were told in the EGM Circular of the absence of any regularisation plans.

[84] In short, on the one hand, the Circular sought to paint the bleakest of an outlook for the first defendant on account of the loss of core business if the proposal before the shareholders was approved. Indeed it was not, thus providing the first defendant the excuse on s. 132C issue, since a major transaction had allegedly not been approved by the shareholders. On the other hand, a proposal involving the potential of loss or change in core business would require shareholders' approval in the context of Chapter 10.11A which mandated stricter regulatory oversight in terms of disclosures and appointment of two sets of advisers. This arguably applied to the EGM convened by the first defendant but did not appear to have been adhered to.

[85] Thus, in my judgment, it is manifest that the refusal to accept the judgments of the court is consistent with what may be construed as the first defendant's overarching purpose of retaining the group's core business, avoiding PN 17 status, and using the rejection as yet again raising the spectre on the absence of s. 132C approval. I have also said the following on the grounds of judgment dismissing the Suit 145:

[153] I cannot but agree with the Purchasers' submission that MHB has sought to use the result of the EGM in 2014 as a "shield" on the spurious pretext to seek protection, but at the same time use the same outcome as a "sword" to continuously act in defiance of the judgments of the Courts. This, the Court cannot accept. It is totally unacceptable.

[154] The key issues in contention, concerning the alleged absence of shareholders' approval for the enlarged capital of RRSB under Section 132C (1A) had also been specifically raised and submitted by the first defendant herein in the review application and in Enclosures 62 and 69.

[155] I would not endeavour to say much more on this issue of *res judicata* and estoppel other than concluding that attempts to re-litigate matters over and over again, and that too by instalments, are downright unconscionable and could potentially amount to equitable fraud (*Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291).

[86] As such, in the instant case, since it has been shown that the various proceedings had been initiated by the first and second defendants for an improper purpose, resulting in injuries to the plaintiffs, the tort of abuse of process has clearly been established.

Tort Of Conspiracy – Elements

[87] In dealing with the element of the tort of conspiracy, I can do no better than reproduce the pertinent passages from the judgment of Mohd Zawawi Salleh JCA in a recent Court of Appeal decision in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676, as follows:

- A [10] To appreciate the submissions advanced by learned counsel for the defendants, we think it is relevant to deal with the law of conspiracy which is part of what are known as the “economic torts”. There are four elements to a conspiracy claim:
- (i) a combination or agreement between two or more individuals;
- B (ii) an intent to injure;
- (iii) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and
- (iv) resulting loss and damage to the claimant.
- C (See *Khoo Teng Chye v. Cekal Berjasa Sdn Bhd & Anor*, Civil Appeal No: P-02-542-03-2015 (CA) [2015] 6 CLJ 449 (CA)).
- [11] There are two kinds of conspiracy, the elements of which are distinct:
- (i) unlawful means conspiracy: a conspiracy in which the participants combine to perform acts which are themselves unlawful (under either criminal or civil law); and
- D (ii) lawful means conspiracy: a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole predominant purpose of injuring the claimant - it is in the fact of the conspiracy that the unlawfulness resides. (See *Milicent Rosalind Danker & Anor v. Malaysia-Europe Forum Bhd & Ors* [2012] 2 CLJ 1076 (HC); *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393 (CA)).
- E [12] The distinction between the two was succinctly elucidated by Lord Bridge in *Lonrho Plc v. Fayed & Others* [1991] 3 All ER 303 as follows:
- F Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious.
- G But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.
- H [88] A conspiracy essentially consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means (see *Mulcahy v. R* (1868) LR HL 306). The tort of lawful means conspiracy and unlawful means conspiracy both require evidence of the element of an agreement between two or more parties who take concerted action that causes injury to
- I the claimant.

[89] Lawful means conspiracy stipulates that the defendants' predominant or overriding purpose is to cause loss or damage to the claimant but does not necessitate demonstration of any unlawful acts perpetrated by the conspirators or the parties to the agreement or in combination.

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[90] The distinct element of unlawful means conspiracy is that these defendants use unlawful means in pursuit of their objective. In this respect, two additional elements relevant to unlawful means conspiracy must be highlighted. First, the mandatory requirement is only to show an intention to injure, not that it must be the sole or predominant purpose to do so.

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[91] It could thus be one of the purposes of the agreement (see *Lonrho plc v. Fayed* [1992] 1 AC 448). This can be satisfied where a conspiracy is targeted at another party and it can be reasonably foreseen that the conspiracy may cause damage or loss to that party. Once the use of unlawful means is established, it suffices if the injury to the claimant is one of their intended purposes.

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[92] Secondly, as was held by the House of Lords in *SL v. HM Revenue and Customs* [2008] 2 All ER 413 the tort of conspiracy to use unlawful means does not require that the unlawful means must be independently actionable at the suit of the claimant. Both crimes and civil wrongs can constitute unlawful means.

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Combination And Agreement Established

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[93] In respect of the element for combination or agreement among conspirators, it has been long-established that the agreement need not be express and may be inferred from overt acts, where several parties take steps towards one collective purpose, and where the participation in a conspiracy may be active or passive (see *R v. Siracusa* [1989] 90 Cr App Rep 340 and *The King and the Attorney-General of the Commonwealth v. Associated Northern Collieries & Ors* [1911] 14 CLR 387).

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Directors Can Conspire With Own Company

[94] I further find no legal basis to preclude the third to the tenth defendants, being the directors and CEO of the first defendant from being found to be acting in combination with other defendants despite the fact that the directors and CEO are the agents of the company. There is in my judgment no legal impediment to a finding that a company can conspire with its own directors (see for example, the decision of Vinelott J in *Prudential Assurance Co Ltd v. Newman Industries Ltd* [1981] Ch 29).

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[95] There is no insuperable difficulty in holding that a company can conspire with its own director to cause harm to another party even if the director is the directing mind and will of the company. In this sense where

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A a corporation is involved, a conspiracy can occur between two legal persons who share one and the same mind. This is also the position in Singapore, where Judith Prakash J in the case of *Nagase Singapore Pte Ltd v. Ching Kai Huat* [2008] 1 SLR 80 stated thus:

B ... I am satisfied that in law, there can be a conspiracy between a company and its controlling director to damage a third party by unlawful means notwithstanding that the director may be the moving spirit of the company ...

C [96] The problems, as I have highlighted, associated with the defendants' heavy reliance on the legal opinions apply equally to the position taken by the third to the tenth defendants. Another anomaly if not an outright flaw in their argument is that, as stated, the second defendant had already started to defy the order of specific performance in the proceedings prior to the receipt of the legal opinions. This more than abundantly suggests that the claim by the defendants that they were merely discharging their duty or enforcing their legal rights to be as untenable as it is disingenuous. Similarly, any argument that the decisions taken by the directors amongst the defendants to have been in the nature of business judgment and therefore protected is misconceived.

Decisions Not Business Judgment Under Companies Act 1965

E [97] Business judgments are protected under s. 132(1B) of the Companies Act 1965. It reads:

Business judgment

F (1B) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director:

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- (a) makes the business judgment in good faith for a proper purpose;
 - (b) does not have a material personal interest in the subject matter of the business judgment;
 - (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
 - (d) reasonably believes that the business judgment is in the best interest of the company.

H [98] I find it difficult for any of the directors of the first defendant to succeed on the argument that the decisions to continually litigate on issues already decided by the courts were in the nature of business judgments. When the matters have already been adjudicated, even basic logic will tell a reasonable person that such matters cannot be continually be brought to

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court for further litigation. What more in this case, where the defendants include directors of a listed entity, an experienced CEO, and when the courts had even expressed their clear disapproval of the re-litigation in encls. 62 and 69 which even preceded the Suit 145, as related to earlier in this judgment.

[99] In short, the defendants cannot pass muster the requirements of s. 132(1B) that the decisions were made in good faith, for proper purpose, in the reasonable belief that they were appropriate and in the best interest of the company, and without any personal interest in the decisions, to benefit from the protection of the said s. 132(1B).

Parent Can Conspire With Wholly-Owned Subsidiary

[100] Neither does the law not recognise the ability of the first and second defendants of conspiring with one another on account only of the identity of interest between the two (see the English High Court decision in *Twentieth Century Fox Films Corporation and Others v. David Harris and Others* [2014] EWHC 1568 (Ch)). They are separate legal entities but they are also related corporations under Companies Act 1965.

[101] More pertinently, the first defendant is the holding company of the second defendant. They share a common CEO in DW1, and have common directors. The core business of the group helmed by the listed first defendant at the material time, namely the plantation assets, were indirectly held by the second defendant, thus rendering matters concerning the second defendant to have an impact on the affairs of the first defendant. Their relationship, as supported by evidence manifestly showed that they work in concert in the pursuit of the proceedings.

[102] As stated, the preponderance of evidence showed the conduct and acts of the defendants such as the filing of the FC review, encl. 69 and the Suit 145 in seeking the re-litigation of matters already adjudicated on, frustrating completion, seeking further legal opinions, convening the EGM with the Circular referred to earlier, all of which do nothing but reveal the true intention of the defendants in not adhering to the decisions of the courts, thwarting the enforcement of the decisions, and demanding more money from the plaintiffs.

[103] There can then be little doubt that the irresistible inference that must be drawn from the aforesaid conduct and acts of the defendants in this Suit 326, is that the conspiracy of combination or agreement involving all ten defendants in their respective parts and roles consisted principally of their common agreement of objectives of persistently denying the plaintiffs, despite the FC Judgment Suit 109, from enjoying the fruits of their litigation, continually refusing to execute specific performance, demanding for more payments from the plaintiffs, and ensuring that the first and second defendants get to retain the plantation assets as the core business of the group.

A *Intention Of Injuring The Plaintiff In Concerted Fashion Established*

[104] The objective of the agreement in the aforesaid conspiracy was to injure the interest of the plaintiffs, given especially the evidence on the repeated court proceedings and their reliefs, as well as their timing, and pursued in instalments to boot, all further point inescapably to the presence of the intention to cause harm to the plaintiffs.

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[105] This more than qualifies as the predominant intention in a lawful means conspiracy, which can be said to be had by each of the ten defendants, or at the very least a predominant or sole intention to injure in the nature of reckless indifference to the injury caused to the plaintiffs, insofar as the third to the tenth defendants are concerned.

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[106] In relation to lawful means conspiracy, the sole or predominant intention on the part of the defendants in their conspiracy to injure the plaintiffs is more than amply shown to be manifested in the former refusing to permit the plaintiffs see through the completion of the purchase transactions, demanding more payments from them, thus benefiting the defendants, more directly the first and second defendants, by their retention of the core business that was the plantation assets subject to the purchase. And for unlawful means conspiracy, such a predominant intention for lawful means is more than sufficient to satisfy the element of an intention to cause harm in an unlawful means conspiracy.

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[107] Furthermore, there is no insurmountable difficulty in showing that the defendants in a conspiracy had acted with a predominant intention to injure the plaintiffs, because even though the defendants may have done so to enrich themselves, the element of the intention to injure can nevertheless still be found against them, since a loss to the plaintiffs is the flipside or opposite to the gain for the defendants (see further discussion on injury and damages below).

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[108] The CEO for the first defendant (DW1) had given evidence that all the directors (the third to the ninth defendants) had the requisite knowledge and participated in the decision-making process of all issues in contention such as rejecting payment made by the plaintiffs after the FC Judgment Suit 109, the institution of the various proceedings and even on instructing solicitors.

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[109] In accordance with case law authorities as referred to earlier, such an intention is also sufficient for purposes of establishing the tort of unlawful means conspiracy for it was directed at the plaintiff and it could reasonably be foreseen that it may injure them and did in fact injure them. I agree with the argument of the plaintiffs that the unlawful means employed by the defendants is the continual re-litigation of the issues which are manifestly already *res judicata*, which is also a substantive rule of law, as well as engaging in an abuse of process in their incessant pursuit of the various proceedings.

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[110] The evidence in this case is that the defendants, by their retention of the core business that was the plantation assets subject to the purchase, and for unlawful means conspiracy, such a predominant intention for lawful means is more than sufficient to satisfy the element of an intention to cause harm in an unlawful means conspiracy.

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[111] In accordance with case law authorities as referred to earlier, such an intention is also sufficient for purposes of establishing the tort of unlawful means conspiracy for it was directed at the plaintiff and it could reasonably be foreseen that it may injure them and did in fact injure them. I agree with the argument of the plaintiffs that the unlawful means employed by the defendants is the continual re-litigation of the issues which are manifestly already *res judicata*, which is also a substantive rule of law, as well as engaging in an abuse of process in their incessant pursuit of the various proceedings.

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[112] The evidence in this case is that the defendants, by their retention of the core business that was the plantation assets subject to the purchase, and for unlawful means conspiracy, such a predominant intention for lawful means is more than sufficient to satisfy the element of an intention to cause harm in an unlawful means conspiracy.

[110] As stated earlier, the concept of unlawful means in this tort of conspiracy admits of a wide scope. The following words of Lord Nicholls in *OBG Ltd and others v. Allan* [2007] UKHL 21 are most apt:

So understood the concept of “unlawful means” stretches far and wide. It covers common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on,

... In this context, the expression “unlawful means” embraces all acts a defendant is not permitted to do, whether by the civil law or the criminal law.

Director Defendants Chose Not To Give Evidence Or Be Cross-Examined

[111] It is worthy of emphasis that despite being the directing will and mind of the first defendant, all the directors (being the third to the ninth defendants) with the exception of the chairman (even that only in the Suit 145, not in the claim against him in this Suit 326) chose not to give evidence, what more be available for cross-examination, despite each having been identified, named and sued for the tort of conspiracy. This certainly does little to bolster their defence.

[112] And in any event, the evidence given by the CEO confirmed that the directors had authorised the CEO, who is not a member of the Board, to give evidence on their behalf but who at the same time agreed that he could not possibly testify on the state of minds of the directors. And the reliance on the legal opinion’s argument has also been found to be more than wanting, earlier in this judgment.

Authorities Do Not Advance Case Of Defendants

[113] The first and second defendants also submitted on a number of authorities to support their stance. I shall only deal with the ones I consider more relevant for present purposes. It was submitted that the Court of Appeal case of *Formis Resources Bhd & Ors v. Risk Management and Safety Systems Pty Ltd & Ors And Other Appeals* [2016] 9 CLJ 169; [2016] 6 MLJ 73 held that the court should not infer any sinister intention when contemporaneous documents are capable of giving rise to other inferences such that in the instant case, the defendants argued to have acted in good faith to protect the interests of the companies based on legal advice.

[114] I do not see how this decision could truly advance the case for the defendants. Documents in the forms of letters attributed to the second defendant, supported by testimony by DW1 showed refusal to complete despite courts judgments since the FC Judgment Suit 109. The inference pointing to a conspiracy is irresistible. The argument on the purported reliance on legal advice, given the facts of the instant case and the history in litigation, and as has been discussed earlier, is simply difficult to sustain.

- A [115] And crucially, it is basic as it is common sense that good faith cannot be an excuse not to obey decisions of the courts. In truth, when one is aware of the nature of judgments of the courts, and to their credit, none of the defendants is pleading that the concept of court judgments is alien to any of them, the refusal or failure to adhere to the same, unless stayed or set aside, cannot under any circumstances amount to any act or conduct premised on good faith.
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- [116] Reliance was also placed on the English Court of Appeal decision in *Meretz Investments NV v. ACP Ltd* [2008] Ch 244 which held that a person who sets out to protect his own interests in the belief that he has a lawful right to do what he is doing, based on legal advice, does not have the intention required for the torts of inducing a breach of contract or conspiring to injure by unlawful means, even though the inevitable result of acting in that way will be to cause loss to another.
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- [117] In the leading authority of *Belmont Finance v. Williams Furniture* [1980] 1 All ER 393 it was established that if parties have knowledge of the facts which made the relevant transaction unlawful, they could be liable for unlawful means conspiracy even if they did not appreciate that the transaction itself is unlawful. As submitted by the first defendant, the English Court of Appeal in *Meretz* expressed the view that it is a defence to an action for unlawful means conspiracy if the defendant acted in a belief that he had the lawful right to act as he did. The first defendant argued that in light of *Meretz*, the principle enunciated in *Belmont Finance* is therefore no longer good law.
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- [118] But there is at least one English High Court decision, in the case of *First Subsea Ltd v. Balltec Ltd and Others* [2014] EWHC 866 (Ch) which rejected this view, on the basis that the relevant statements in *Meretz* were *obiter* and that despite *Belmont Finance*, on this point, having been referred to the House of Lords in *OBG Ltd and others v. Allan* [2007] UKHL 21, a decision on the related tort of causing loss by unlawful means, the House of Lords in *OBG Ltd* did not in any manner discredit let alone overrule *Belmont Finance*.
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- [119] In any event, it should also be emphasised that in *Meretz*, the defendants' belief in their lawful right to do what they did was also, like in the instant case based on legal advice but which unlike in the instant case, the opinion in *Meretz* was produced to the court as evidence. Not in the instant case.
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- [120] The other reason why this case cannot support the position of the defendants is plain. I cannot accept that the defendants could be said to have held on to the belief that they had a lawful right to continually litigate matters which had been adjudicated on, especially when the courts have even
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specifically pointed out in express terms that encl. 69 was wholly unnecessary and had been initiated due to the second defendant's disobedience and defiance in its refusal to accept the judgment of the court.

[121] I therefore find that given there is no dearth of clear, positive and convincing evidence on the satisfaction of the elements of the defendants having in combination and agreement colluded to injure the interests of the plaintiffs and taken steps for that purpose in concerted fashion, resulting in loss to the plaintiffs, the torts of lawful means as well as unlawful means conspiracy have thus been established by the plaintiffs against all the defendants.

Damages

[122] The crux of the claim in the instant case for the harm and injury inflicted on the plaintiffs, arising from the torts of abuse and conspiracy perpetrated by the defendants, concerns the loss of opportunity by the plaintiffs, of maximising the full potential of the plantation lands and the mill.

[123] On damages, I find the claim for special damages related to the loss of opportunity to the amount of RM25,159,294.16 to the plaintiffs from 2013 to the first six months of 2016 to develop the plantation lands to maximise potential to be supported by evidence. On loss of yield income, the plaintiffs could have undertaken re-planting on the Ganda Plantation much earlier if not for the non-completion engineered by the defendants.

[124] The approach undertaken in proving loss of opportunity in maximising yield was by comparing yield per hectare per annum derived from adjacent estates as against the actual yield recorded by the ageing trees of Ganda Plantation. The methodology also employed a projected yield per hectare per annum figure of 30 MT as derived from the actual yield of the neighbouring Cempaka Plantation estate based on fresh fruit bunches sales records, as tendered in court.

[125] I accept the evidence of PW4 and PW5, both the expert witnesses for the plaintiffs. I do not find anything obviously indefensible or unsupported by basic facts in the reports tendered by the experts, more so when they were cross-examined (see the Court of Appeal decision in *Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337; [2015] 1 MLJ 171). Crucially, no expert report was offered by the defendants to challenge that of the experts for the plaintiffs. In any event, I find PW4's explanation when challenged in cross-examination on the alleged wholly hypothetical premise of their report to be credible, convincing and therefore acceptable.

[126] Although pursuant to the relevant management agreement, the plaintiffs were in possession of the plantation assets, the all-important legal and registered ownership was denied to them, and as supported by the

A financial statements of the third defendant in the counterclaim (Sri Ganda Oil Mill) the plaintiffs had thus far only largely expended on the maintenance of the plantation and not on replanting activities. The first and second defendants cannot validly contend that being in possession, the plaintiffs were never prevented from developing the plantation lands and the mill.

B [127] This is because, again, legal ownership was denied and the management agreement was said by the second defendant to have been terminated when the Court of Appeal reversed the HC Judgment Suit 109. The first and second defendants cannot benefit in this fashion when they were the ones refusing to obey the judgments of the courts.

C [128] In the case of *Bank Simpanan Nasional v. Rudyslam Abdul Raof* [2017] 4 CLJ 234, I had stated thus:

No Benefit from Own Default

D [88] It is also my finding that the appellant is additionally subject to the trite principle of law that a party cannot benefit from his own wrong or default, which in this case, being the negligent mistake by the appellant. It is an established presumption in law that parties to a contract do not intend that either party should be able to rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co v. Société des Ateliers et Chantiers de France* [1919] AC 1.

E [129] On the claim for loss of savings which the plaintiffs could have avoided if they had legal title of the mill, specifically the special damages in respect of maintenance savings for the mill, machinery replacement cost and
F reduction of labour costs, I find that these are all supported by the same contemporaneous documents relied on by PW5 in arriving at his conclusions in his expert report on the efficiency of the existing mill (not countered by any expert report by the defendants) particularly on the savings if the mill had been upgraded to the cage-less sterilizer system. The claim for
G RM1,861,780.98 is therefore justified.

H [130] The other final claim of special damages for additional diesel cost of RM517.875 and additional labour costs of RM1,696,784.24 related to maintaining an inefficient mill operation in its current state is similarly supported by documentary records and the uncontroverted expert report by PW5, and thus should also be allowed.

I [131] Further, the presence of Sri Ganda Oil Mill (the third defendant in the counterclaim) who incurred the expenses for operating and maintaining the mill does not affect the claim of the plaintiffs. It is irrelevant to the question on the liability of the defendants in having caused damage and loss to the plaintiffs. There can be no dispute that, on the evidence, including that of DW1, Sri Ganda was the agent appointed by the plaintiffs to manage the plantation and the mill on their behalf.

- [132] This is because clearly the plaintiffs are the contracting parties (with the second defendant) against whom the torts were committed, who should rightly be entitled to the legal ownership of the plantations, and crucially are the ones who had suffered the loss. An owner to a property damaged by another can claim damages even if the costs of repairs come from a third party source (see the English Court of Appeal decision in *Jones and another v. Stroud District Council* [1988] 1 All ER 5, and the House of Lords decisions in *Linden Gardens Trust Ltd v. Lenesta Sludge Disposal Ltd* [1993] 36 Con LR 1 and in *Hunt v. Severs* [1994] 2 AC 350). A B
- [133] I accept the basis for the grant of general damages for the loss of the short term lease in that if not for the torts, the plaintiffs would have renewed the lease. The purchase price, transacted in 2003, of the plantation lands was RM30.6 million when the lease had 30 years more to run before expiry. This generally averaged to about RM1 million per year. The plaintiffs' claim for RM4 million in general damages for a claim period of 2013 to 2017, since the torts were committed in 2013 (after the FC Judgment Suit 109) is therefore not unreasonable and ought to be considered positively. C D
- [134] But I am of the view that considering the circumstances and the award of special damages, the award of RM1 million in general damages to be a more reasonable and appropriate sum. The plaintiffs are entitled to be compensated for the harm done to their economic interests (see *Deepak Jaikishan Jaikishan Rewachand v. Intrared Sdn Bhd & Another* [2013] 7 MLJ 437). E
- [135] Further, given the continual, incessant and wholly unwarranted filing of proceedings which tantamount to a blatant refusal to accept the finality of judgments of the courts, and unduly delaying what is rightly the entitlement of the plaintiffs to enjoy, I am of the view that the grant of exemplary damages is justified, applying the principles enunciated in the leading House of Lords decision in *Rookes v. Barnard and Others* [1964] 1 All ER 367, particularly in respect of the second category of situations justifying the grant of exemplary damages (the conduct of defendants was calculated to make a profit for themselves which may well exceed the compensation payable to the plaintiffs) and the Court of Appeal decision in *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610. F G
- [136] I am of the view that the award of RM250,000 is reasonable and sufficiently demonstrates, in the circumstances of this case, and given the other awards of special and general damages, to use the words of Lord Devlin in *Rookes v. Barnard*, the need "to teach the wrongdoer that tort does not pay". I do not however allow the claim for aggravated damages which I consider unnecessary on the facts of the case and taking into account the other awards made by this court. H I

A Counterclaim

[137] As stated in the earlier part of this judgment, in the instant counterclaim, the second defendant as the plaintiff is seeking for various declarations and reliefs, including an account for profit share and rental for the plantation lands and the related mill from July 2011 for the sum of RM43,045,551.38, unjust enrichment on the part of the plaintiffs in respect of the increased share capital in RRSB, the need for approval under s. 132C of the Companies Act 1965, for the transfer of 99,998 shares, that the same shares be restored to the second defendant, and that the High Court decision on encls. 62 and 69 dated 17 February 2015 granted to the plaintiffs be impeached on the ground of fraud.

[138] I find the reliance by the second defendant on the argument that the decision of the High Court on encls. 62 and 69 was obtained by fraud which purported evidence allegedly subsequently came to light in the testimony of the first plaintiff during his cross-examination in Suit 145; and that there was new evidence in the form of admissions made in the accounting treatment recorded in the financial statements of the Sri Ganda or the third defendant in the counterclaim, to be wholly unmeritorious.

[139] A review of the notes of proceedings did not reveal that the first plaintiff agreed that the relevant agreement was for only two shares in RRSB since it was clear in the context that his position was that the agreement had always been for the entire share capital of RRSB.

[140] The alleged new evidence in the financial statements of Sri Ganda cannot validly be construed as such since the second defendant could have obtained the purported evidence in the said financial statements to be tendered in any of the earlier proceedings. The second defendant failed to do so.

[141] In any event, the counterclaim can achieve nothing but failure because the allegations and complaints as well as the reliefs pleaded in the same are, yet again, *res judicata*. The counterclaim is thus far the final instalment in the unmeritorious series of re-litigation mounted by the defendants. It is an abuse of process by the second defendant pure and simple.

[142] The same issues have thus far been raised for a staggering seventh time, in that they had been ventilated at and dismissed by the High Court three times, once at the Court of Appeal and three times at the Federal Court. I therefore dismiss the counterclaim in its entirety.

Reliefs Against Prayers

[143] Therefore in reference to the para. 53.1 and 53.2 of the re-re-amended statement of claim, I order special damages against the first and second defendants jointly and severally in the sum of RM29,235,678.38 as pleaded under (a), general damages of RM1,000,000 under (b), exemplary damages

of RM250,000 under (c), interest as pleaded under (e) which is 5% from date of judgment to full satisfaction.

[144] I also find the all defendants liable for tort of conspiracy jointly and severally; and order special damages for the same amount as pleaded in (a) and interest as pleaded under (d). For clarity, the first and second defendants' liability, jointly and severally, for special damages for both torts is limited to the single amount of RM29,235,678.38.

Conclusion

[145] In view of the foregoing reasons, I find that the plaintiffs have succeeded in proving their case against the defendants on a balance of probabilities. The reverse is not true for the counterclaim instituted by the second defendant.

[146] I therefore allow the reliefs prayed for by the plaintiffs in terms stated earlier, and dismiss the counterclaim in its entirety. I also order costs for the plaintiffs.

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